

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-1229

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA

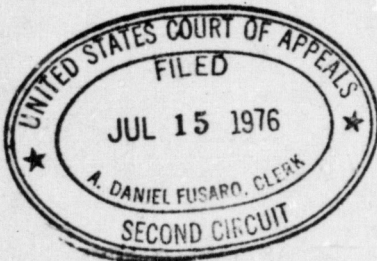
-against-

GAYLORD W. ANGUISH

Appellant
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P/S
Docket No. 76-1229

BRIEF ON BEHALF OF APPELLANT



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PRELIMINARY STATEMENT UNDER
SECOND CIRCUIT RULE 28

GAYLORD ANGUISH appeals from a judgment of conviction entered on May 6, 1976 in the United States District Court for the Eastern District of New York, after a four day trial before the HONORABLE EDWARD R. NEAHER, United States District Judge, and a jury.

STATEMENT OF THE ISSUE

The issue in this appeal is whether a defendant suffering from amnesia as to the events at the time of the alleged crime may be tried for said crime, and whether to require him to stand trial is a denial of due process or the right to effective assistance of counsel.

STATEMENT OF THE CASE

The appellant was indicted on a two count indictment charging him with bank robbery of the Bankers Trust Company branch in Commack, New York, and with armed robbery of the same bank in the second count of the indictment, in violation of Title 18, United States Code, Sections 2113 (a) and 2113 (d). At the same time, the appellant was also indicted in separate indictments in the United States District Court for the Eastern District of New York for four other bank robberies.

On January 31, 1975 the appellant offered a plea of guilty to count two of the indictment on which he was tried in satisfaction of count one and of the four other pending bank robbery indictments and a sixth unindicted bank robbery. After a Rule 11 inquiry, the court accepted appellant's guilty plea. Prior to sentencing several psychiatric examinations were made of the appellant as an aid to the court. DR. LAWRENCE M. BLOOM, a private psychiatrist, found he had committed the crimes in "a state of psychotic depression", (App. p.10). and DR. NAOMI GOLDSTEIN, Chief of Psychiatry of Metropolitan Correction Center, diagnosed his condition as "schizophrenic reaction-latent, with depressive, neurotic and sociopathic features" (App. p.10). On July 30, 1975, after examination by psychiatrists at Springfield Medical Center, he was found competent and "without psychosis" but suffering from "latent and pre or idealistic schizophrenia, by history" (App. p 11).

On August 25, 1975, appellant pro se requested permission to withdraw his plea of guilty and to plead not guilty by reason of insanity. He requested that his retained counsel be relieved and new counsel appointed under the Criminal Justice Act. This was done, and his present counsel was appointed by the Court. By notice of motion dated September 30, 1975, counsel formally moved to withdraw the guilty plea. A hearing was held on January 12, 1976. Prior to that hearing and in the early part of the month of October, 1975, the appellant developed amnesia.* According to the testimony of DR. NAOMI GOLDSTEIN at the hearing,

*(Hearing transcript of Jan. 12, 1976, page 53)

this amnesia covered the period from 1969 through early October, 1975.

Q. Doctor, can you give us any opinion as to the period covered by this retrograde amnesia?

A. Approximately 1969, through September or early October, 1975. He is not amnesic at the present time for events from October through the present.

(Testimony of Dr. Naomi Goldstein, Metropolitan Correction Center, hearing transcript of January 12, 1976, p. 53).

DR. DANIEL W. SCHWARTZ, director of Forensic Psychiatric Services of Kings County Hospital Center, testified as to the appellant's amnesia at the hearing as follows:

Q. And will you state for us what your professional opinion was at that time?

A. At the time I examined Mr. Anguish he showed no evidence of psychosis. He did appear to be undergoing what would be called an adjustment reaction, manifested primarily by amnesia, apparent amnesia for a period of about five years of his life, a period which included the time of the present offenses and his plea of guilty to the Court.

(Hearing transcript, January 12, 1976, page 19).

The appellant took the stand and testified that he had no memory of the events surrounding the crime charged.

DR. ROBERT W. COLLIER, of Springfield Medical Center, testified for the appellant at the hearing and stated that at the time he examined him he appeared to have amnesia. (Hearing transcript of January 12, 1976, p. 66).

DRS. HAROLD B. FAIN and JACK EARDLEY of Springfield Medical Center testified that the appellant's amnesia was not genuine and that he was malingering.

After the hearing the Court granted the appellant's motion to withdraw his guilty plea and then determined him to be competent to stand trial. The court's decision dealt with the question of amnesia:

Much of the psychiatric testimony at the hearing was directed at the genuineness of this amnesia. Although the weight of psychiatric opinion was in favor of concluding that defendant's amnesia was more feigned than real, a resolution of this question is not essential to a determination of Sec. 4244 competency. (App. pp 15 & 16).

The appellant filed the required Notice of the Defense of insanity.

Trial was scheduled for April 19, 1976 and commenced on that date after a suppression hearing. RALP BARBATO, the bank manager of the Banker's Trust Company in Commack testified as to the holdup and positively identified the appellant as the sole robber on that date, as did CAROL CORLEY, a teller. One CHRISTINE CLARK DOYLE, sales agent for a car rental agency, testified that on June 28, 1974, the appellant rented the car used in the holdup from her agency and identified appellant in the courtroom.

Special Agent JOSEPH CHIARAMONTE of the San Jose, California, office of the F.B.I. testified that acting on information from the New York office of that agency he located the residence of the appellant in Los Gatos, California, went there and conferred with one SANDRA MILLER, the paramour of the appellant,

and also spoke to the appellant by phone. He made an agreement with ANGUISH to surrender on condition that ANGUISH would be released on a personal recognizance bond. He stated that ANGUISH came to his office with MILLER, and surrendered, making a full confession as to his bank robbery activities. Following this, ANGUISH, was taken to a U.S. Magistrate and released on a personal recognizance bond, his activities being restricted to California.

Special Agent DANNY O. COULSON of the F.B.I. testified that in January, 1975 he was in the New York Office of that agency. Acting on orders he went to J.F.K. Airport and there arrested the appellant who was arriving from California.

THE DEFENDANT'S CASE

HELEN HEBRON, the appellant's mother, testified first for the defense, as to the appellant's past life and various psychic trauma, including his father's suicide at age 6, and the death of his young wife several years after his marriage. She further testified as to the appellant's bizarre behavior when his daughter accompanied him to her home.

DR. LAWRENCE M. BLOOM, a qualified psychiatrist, testified for the defense and stated that the appellant was unable to control his behavior at the time of the robberies and that he acted under a compulsion to commit them. DR. NAOMI GOLDSTEIN, Chief of Psychiatry at the Metropolitan Correction Center, testified also that as a result of her study and observation of the appellant, that

he acted under compulsion in committing the bank robberies and could not control his behavior. Both psychiatrists said his amnesia was genuine.

GOVERNMENT REBUTTAL

DR. DANIEL W. SCHWARTZ, who had previously testified for the defense on the hearing of January 12, 1976, was called in rebuttal. He testified that the behavior of the appellant during the robbery was perfectly normal and that he did not believe he had amnesia at the present time.

DR. HAROLD B. FAIN, of Springfield Medical Center, testified that he was a psychiatrist and after examining and studying the appellant he concluded that the appellant appreciated the wrongfulness of his conduct and could conform his conduct to the law if he wished to do so.

After the Court's charge the jury retired and after deliberation, convicted the appellant of both counts in the indictment.

On May 6, 1976, JUDGE NEAHER sentenced the appellant to the custody of the Attorney General for a period of 10 years pursuant to Title 18 United States Code 4208 (a) (2) with credit for time served.

POINT I

TO REQUIRE A DEFENDANT SUFFERING
FROM AMNESIA AS TO THE EVENTS OF
THE ALLEGED CRIME TO STAND TRIAL
IS A DENIAL OF DUE PROCESS AND THE
RIGHT TO EFFECTIVE ASSISTANCE OF
COUNSEL.

A claim of amnesia as to the events surrounding an alleged crime does

not of itself establish incompetency to proceed to trial. United States v. Sullivan, 406 F 2d 180, 185 (2nd Cir. 1969); Wilson v. United States 391 F 2d, 460 (D.C. Cir 1968); United States ex rel Parson v. Anderson, 481 F 2d 94 (3rd Cir. 1973).

Nor is there any claim made here that the defendant was mentally incompetent at the time of trial under the test in DUSKY v. United States 362 U.S. 402, 80 S Ct. 788, 4 L. Ed. 2d 824 (1960) which is stated as follows:

(the) test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding---and whether he has a rational as well as factual understanding of the proceedings against him.

But we have a different situation. We have a case presented with the testimony of two eyewitnesses and a statement allegedly made by the appellant. Because of his amnesia the appellant had no recollection of the events testified to by the eyewitnesses, nor the circumstances under which he allegedly made the statement as to the commission of the crime which was relied on by the government. As was stated in United States ex rel Parson v. Anderson, supra, at page 96,

Had the proof of Parson's commission of the crime been based on eyewitness testimony, or had the prosecution relied substantially on statements attributed to Parson, his amnesia might have significantly hindered the preparation and presentation of a rebuttal defense.

In Parson, supra, there was physical evidence linking him to the crime including samples of Parson's blood, fingernail scrapings and pubic hair as set

forth in the footnote to that decision on page 96. In the instant case when BARBATO and CORLEY testified as eyewitnesses to the crime, the appellant had no recollection of ever having seen them and couldn't take the stand to rebut their testimony. Nor did he have any recollection of having given a statement to F.B.I. Agent CHIARAMONTE, which was strongly relied on by the government.

Obviously the appellant could not take the stand in his own defense, as he had no recollection as to the matters testified to by the government witnesses. This in itself deprived him of a substantial right to testify in his own behalf should he have chosen to do so.

The Court in Wilson, supra, faced this issue and set forth at page 463, the factors the court should consider in a case of this nature:

A prediction of the amnesic defendant's ability to perform these functions must, of course, be made before trial at a competency hearing. But where the case is allowed to go to trial, at its conclusion the trial judge should determine whether the defendant has in fact been able to perform these functions. He should, before imposing sentence, make detailed written findings, after taking any additional evidence deemed necessary, concerning the effect of the amnesia on the fairness of the trial. In making these findings the court should consider the following factors:

- (1) The extent to which the amnesia affected the defendant's ability to consult and assist his lawyer.
- (2) The extent to which the amnesia affected the defendant's ability to testify in his own behalf.
- (3) The extent to which the evidence in suit could be extrinsically reconstructed in view of the defendant's amnesia. Such evidence would include

evidence relating to the crime itself as well as any reasonably possible alibi.

(4) The extent to which the Government assisted the defendant and his counsel in that reconstruction.

(5) The strength of the prosecution's case. Most important here will be whether the Government's case is such as to negate all reasonable hypotheses of innocence. If there is only substantial possibility that the accused could, but for his amnesia, establish an alibi or other defense, it should be presumed that he would have been able to do so.

(6) Any other facts and circumstances which would indicate whether or not the defendant had a fair trial.

In the instant case, the trial court, in its decision as to competency assumed that the appellant conceded the commission of the crime, and stated:

Here, the fact that the defendant committed the robberies charged is virtually, if not completely, conceded. The primary, if not sole issue for the trier of the fact will be whether the defendant should be held criminally responsible under the test adopted in United States v. Freeman 357 F 2d 306 (2nd Cir. 1966) (App. Page 16).

The trial court thus assumed that the facts of the commission of the crime were conceded, which was not so. No inquiry was made at any time as to whether the appellant's amnesia substantially impaired his ability to defend himself.

CONCLUSION

THE CONVICTION OF THE APPELLANT SHOULD BE REVERSED

Respectfully submitted,

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